IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

WEDNESDAY, THE 7TH NOVEMBER 2007/16TH KARTHIKA 1929

RCRev..No. 276 of 2006()

RCA.10/2003 of ADDL.DISTRICT COURT, THRISSUR
RCP.42/1998 of PRL.MUNSIFF COURT,THRISSUR
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PETITIONERS:Respondents/Respondents:-
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1. SIMON, AGED 68, S/O. PONNOKARAN KUNJIVAREED, RESIDING AT KURIACHIRA DESOM, CHIYYARAM VILLAGE, THRISSUR TALUK.

2. SUNNY, S/O. KONNIKKARA MATHUNNY, PARAVATTANY DESOM, OLLUKKARA VILLAGE, THRISSUR TALUK.

3. PALU, AGED 64, S/O. KUTTIKKADAN THOMAS KURIACHIRA DESOM, CHIYYARAM VILLAGE, THRISSUR TALUK.

4. STANELY, AGED 64, S/O. KARALIKKAL JOHN, KURIACHIRA DESOM, CHIYYARAM VILLAGE, THRISSUR TALUK.

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.P.B.KRISHNAN
SRI.HARISH R. MENON
SRI.R.SURAJ KUMAR
SMT.GEETHA P.MENON

RESPONDENT: Appellant/Petitioner:-

RAPPAI, AGED 55, S/O. KALLRAKKAL OUSEPH, MISSION QUARTERS, CHEMBUKKAVU VILLAGE, THRISSUR TALUK.

BY ADV. SRI.JIJO PAUL

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON 18/10//2007, THE COURT ON 07/11 /2007 , PASSED THE FOLLOWING:

K.BALAKRISHNAN NAIR
&
T.R. RAMACHANDRAN NAIR, JJ.

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R.C.R.No. 276 OF 2006.

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Dated this the 7th day of November, 2007.

O R D E R

T.R.Ramachandran Nair, J.

This Revision Petition is filed by the tenants challenging the judgment rendered by the Rent Control Appellate Authority. The respondent herein is the landlord. The landlord filed RCP.No.42/1998 to evict the tenants under Sections 11(2), 11(3) and 11(4)(v) of the Kerala Buildings (Lease and Rent Control) Act, 1956. The rent control court dismissed the eviction petition, and on appeal by the landlord the appellate authority has allowed eviction under Sec.11(3) and 11(4)(v) of the Act.

2. The facts of the case which are necessary for disposing of the revision petition are the following:

The tenanted premises is a shop room in the ground floor of a multi storeyed building. The landlord is occupying a similar shop room adjacent to it on the northern side of the petition schedule room. The same is owned by his wife, and the landlord is conducting jewellery shop named "Maharani

Jewellers" in the said shop room. The petition schedule shop room was purchased by the landlord from its previous owner in the year 1997 as per Ext.A1 sale deed. The premises is required for own use of the landlord to expand his business. Apart from the plea of bonafide need, eviction was sought also on the ground that the tenant has ceased to occupy the room in question for more than 1 ½ years. The tenant resisted the eviction sought contending that the need put forth is not bonafide, that the tenant was conducting gold business earlier and is now planning to start textile business. It is also averred that the tenant is a conducting business as commission agent in the schedule room.

3. Both parties adduced evidence, PW1 was examined and Exts.A1 to A3 were produced on the side of the landlord. RW1 was examined on the side of the tenant and they produced Exts.B1 to B5. Exts.C1 and C2 are commissioner's reports.

4. The rent control court found that the need alleged by the landlord is not bonafide. To enter such a finding the rent control court noted that even though the landlord when examined as PW1 stated that there are other jewellery shops namely, "Ayodhya", "Chiriyankandath" and "Alukkas" which are conducting business on a large scale it was not specified by him that the said shops are in the same street and he did not refer to any tangible evidence to show that the aforesaid jewellery shops are run in a

bigger scale and are getting more business and income. It was also observed that the evidence of PW1 that the said jewellery shops which are conducted in bigger spaces have affected the business of the smaller jewellery shops, was not really substantiated by any documentary evidence. Accordingly, a finding was entered against the landlord on the bonafide need urged. As regards the ground urged under Sec.11(4)(v) of the Act also the rent control court found in favour of the tenants. It was also found that the only source of livelihood of the respondent is the income from the business conducted in the petition schedule shop room. In fact, the rent control court found in favour of the tenant on the grounds urged under Section 11(4)(v) after noticing that there was telephone connection in the said room and that the room was being used for commission agency business as spoken to by RW1.

5. The above findings have been reversed by the appellate authority. It was found that the need put forth by the landlord for expanding his business is genuine. As regards the other plea that the tenant has ceased to occupy the room, the appellate authority found that the evidence clearly established that the tenant had ceased to occupy the room and the report of the commissioner Ext.C1 supported the above conclusion.

6. Heard learned counsel for the parties. The learned counsel for the petitioners Sri.P.B.Krishnan contended that the approach made by the appellate authority is clearly faulty and the findings are totally perverse. The

learned counsel contended that going by the pleadings of the landlord in the petition, he actually wanted the petition schedule building for expansion of his business by annexing the room. It is pointed out that the room in which the landlord is conducting business is owned by his wife and the circumstances do not justify any possibility to demolish the common wall for joining the rooms for expanding the business. It was argued that the appellate authority did not properly assess the evidence to reverse the findings rendered by the rent control court. The report of the commissioner relied upon by the appellate authority was also accepted without examining the commissioner. It is also submitted that the finding by the rent control court under Sec.11(4)(v) was upset by the appellate authority even without referring to Exts.B1 to B5 produced by the tenant. It is, therefore, pointed out that if this Court finds errors on the approach made by the appellate authority then the matter will have to be remitted back to the said authority, as in exercise of the powers of revision under Sec.20, the jurisdiction of this Court cannot be extended to that of an appellate court, to arrive at its own conclusion on the facts and evidence in this case. The jurisdiction of the revisional court under Sec.20 is limited and unlike Sec.107 of the CPC, there is no provision in the Rent Control Act allowing the revisional court to consider the matter on merits. The learned counsel also relied on the additional materials produced before this Court along with an affidavit, to contend that in view of the facts revealed

therein the eviction petition can only be dismissed. The additional materials produced are the copies of the plaint in OS.No.502/1994 on the file of the Subordinate Judge's Court, Thrissur, the written statement and the additional written statement, affidavit dated 7/4/1994 filed by the plaintiff who is the wife of the landlord herein, and the copy of the sale deed in favour of the wife of the landlord. It is contended that the room wherein the landlord is presently doing business is owned by his wife and the wife is not having a clear title over it or at any rate it is clouded, which is clear from the averments made by her in OS.No.502/1994 filed by her. It is also submitted that the landlord had suppressed these facts in the pleadings and therefore the landlord has played fraud on the court which disentitles him from claiming any relief.

7. These arguments were disputed by the learned counsel for the respondent Sri.Jijo Paul. It was argued that the rent control court went at a tangent while approaching the entire issues and the appellate authority has correctly reversed the said decision. The report of the commissioner going by Order 26, Rule 10 forms part of the records and evidence and therefore it was rightly relied upon by the appellate authority and one of the tenants was present during the inspection. It was also submitted that the argument that Exts.B1 to B5 were not considered by the appellate authority is not correct and the tenants have not discharged their burden to prove that they were

conducting business in the petition schedule room. Relying upon Rule 27 of Order 41 CPC it is further pointed out that the additional materials sought to be relied upon by the landlord cannot be accepted by this Court especially in the exercise of revisional jurisdiction.

8. We will now consider the arguments raised by the learned counsel for the petitioners against the findings rendered by the appellate authority. This is a case where the landlord is occupying the immediate northern room of the petition schedule building and is conducting business therein. The need put forward is for expanding the said business. It is averred that there are jewellery shops being conducted on large scale and therefore the landlord propose to expand his business by making use of the tenanted premises also. The genuineness of the said need has to be assessed in the light of the circumstances and evidence available in this case. The petition schedule room was purchased in the year 1997 by the landlord. He is already in the jewellery business which is being conducted in the adjoining room. The evidence tendered by PW1 shows that he has stated that after he started his business other jewellery shops namely, "Ayodhya", "Chiriyankandath" and "Alukkas" who are conducting jewellery business on a larger scale have come into existence. These shops are large in size by two fold or three fold than that the shop room occupied by the landlord. The oral evidence tendered by the landlord further shows that his wife has got another shop in Kannur and

his younger brother has got another shop in Kasargode. There is no challenge in the cross examination as to the coming into existence of large scale businesses named by the landlord. In spite of the same the rent control court disbelieved the version given by the landlord by finding that he did not adduce no further evidence to show that the aforesaid jewellery shops are run in bigger places and are getting more business and income. It was also observed by the rent control court that he did not adduce evidence to show that because of the coming into existence of larger shops the business in smaller jewellery shops have come down. The said approach made by the rent control court has been found against by the appellate authority, according to us rightly. The fact that the landlord wants the petition schedule room for expanding the present business in the adjoining room is clearly pleaded in the eviction petition and has also been spoken to by PW1. It is well settled that the tenant cannot dictate as to how the landlord should adjust his requirements. Judged in the light of the above facts, it is clear that the rent control court had gone wrong in finding that the claim made by the landlord is not bonafide. The appellate authority has considered the plea raised in the eviction petition and the evidence of PW1. It was found that the true test should be whether the need pleaded by the landlord can be said to be natural, real, sincere and honest in the light of the tests laid down by the Apex Court. The appellate authority was of the view that the landlord purchased the room

as per Ext.A1 and the purpose for purchase was spoken to by PW1 as expansion of his business run by him, and since it is clear from the evidence that there are several other big business in the field as "Ayodhya", "Chiriyankandath", "Alukkas" etc., the desire pointed out by the landlord cannot be said to be not genuine.

9. In the light of the facts pleaded by the landlord and in the light of the deposition of PW1, we find that the approach made by the appellate authority cannot be said to be perverse. We have referred to the findings rendered by the rent control court on this aspect to show that the said Court did not approach the question in the right perspective. The rent control court negatived the plea based on considerations which are totally irrelevant to the purpose of the statute. So, the said findings required reversal at the hands of the appellate authority who is equally competent to reverse such findings on the facts and evidence of the case. Being a fact finding authority, the appellate authority is fully empowered to enter its own findings, after appreciating the facts and evidence adduced in this case. Therefore, the argument of the learned counsel for the petitioner on this score cannot be accepted.

10. The learned counsel further pointed out that the landlord can expand his business only by demolishing the common wall between the two rooms. The requirements of such modification have not been pleaded in the

petition and whether that is possible also has not been spoken to or established by cogent evidence. It is, therefore, contended that if the common wall cannot be demolished, the question of expansion does not arise at all and hence on that score itself the plea raised by the landlord has to be rejected. We find no force in the above argument also. Once it is found that the need is genuine it is up to the landlord to decide as to how the room in question should be utilized to his best advantage. The details regarding expansion can be worked out by the landlord after getting vacant possession of the room and it cannot be said to be an impossibility as pointed out by the learned counsel for the petitioner and in view of the facts reported by the Commissioner in Ext.C1.

11. The learned counsel for the petitioners then contended that in fact, the appellate authority has not considered the entire evidence in the right perspective and as the finding of facts rendered by the rent control court are reversed in Appeal this Court cannot re-appreciate the evidence as provisions like Section 107(2) of the CPC are not available in dealing with in a revision petition under Sec.20 of the Act. It is also pointed out that Rule 24, Order 41 which allows the appellate court to determine the case finally on other grounds is also not available to the revisional court under Sec.20 and in the absence of such specific powers, this Court can only remand the matter to the appellate authority, if it is found that the approach made by the appellate

authority is faulty. Reliance is placed on the decisions of the Apex Court reported in *Santosh Hazari v. Purushottam Towari* (2001(3) SCC 179) and in *Madhukar v Sangram* (2001(4) SCC 756). In fact, these arguments have been raised to sustain the contention that the evidence adduced by the petitioners and the documents produced by them have not been referred to or discussed in the judgment of the appellate authority. We will examine the question in the light of the vehement argument made by the learned counsel for the petitioner in respect of the finding on the ground under Sec.11(4)(v) of the Act. The landlord clearly pleaded that the tenant is not conducting any business in the petition schedule room. Ext.C1 is the report of the commissioner. The materials reported by the commissioner have been referred to by the appellate authority in para.30 of the judgment. The commissioner visited the site on 4/4/1998 ie. on the next day of filing of the eviction petition. It was reported that the commissioner that he found the premises in an unused condition. He found that even though the room was open, inside the same there were seven chairs and he could not find any evidence of them being used. On the western corner of the room, he found that old waste materials like boxes, paper packets etc., were remaining piled up. At a separate portion, an old closet and a broken flush tank was also found. This portion was covered with dust, cobwebs etc. It was found by the commissioner that the cupboards were found filled with dust. The same is the

position as regards the inside portion of the counter also. By verifying with the neighbouring shop owners he got the information that even though the room was being opened no business was being conducted for the last more than 1 ½ years. A reading of the judgment of the appellate authority shows that, apart from the report of the commissioner, the evidence of PW1 was also relied upon. It was also found by the appellate authority that apart from the telephone there and that some people were engaged in conversation sitting on the floor of the petition schedule room, the commissioner has not noticed the existence of the conduct of any business there. The appellate authority referred to the evidence of RW1 that they were not maintaining any accounts of the business also. Thus by relying upon the evidence as above the appellate authority entered a clear finding that the respondents were not doing any business in the petition schedule room. It was also found that, if actually they were doing business they could have very well produced the accounts relating to the same and the absence of the same is a strong circumstance to establish that the respondents were not using the petition schedule room for running any business.

12. Here, the argument of the learned counsel for the petitioner, as we pointed out already, is that Exts.B1 to B5 have not been discussed by the appellate authority at all. It is, therefore, submitted that the matter requires remand to that court again. On a reading of Exts.B1 to B5 we notice that the

same are not helpful to support the claim of petitioners. Ext.B1 has been produced to show that the tenant had started garment business in the year 1999, after the filing of the eviction petition. The other documents are also produced by the tenant mainly to show that he is presently doing business therein. Ext.B2 is the sales tax assessment order in respect of Vanitha Jewellery which was being run by the tenant and Ext.B3 is a notice of assessment issued for the period 1997-'98 of Vanitha Jewellery. A reference to the evidence of RW1 is relevant here. He admits that Vanitha Jewellery has not been remitting any income tax and the sale of gold ornaments in the shop was stopped for nearly five to ten years. As regards the garment business also the deposition shows that presently he is not paying salary to the Manager Mr.Suresh and he is being paid only commission on the sales for which there are no documents and he is not maintaining any day book also. In fact, the landlord had stated that the materials of the footpath vendors were being placed in the shop room and this is also admitted by the RW1 in his evidence. The evidence of RW1 thus do not inspire any confidence to show that business was being run in the schedule room even as commission agent. The appellate authority has clearly considered this evidence and has therefore concluded that the evidence shows that the tenants were found not doing any business in the petition schedule shop room. A reference to Exts.B1 to B5 would show that they will not establish the fact that any business was

being done in the petition schedule room for six months prior to the date of the eviction petition, which is the requirement of Section 11(4)(v).

13. We will now refer to the decisions relied on by the learned counsel for the petitioners to contend for the position that while reversing the finding of fact the appellate court is bound to assign its own reasons for arriving at a different finding. The Apex Court in para.15 of *Santosh Hazari v. Purushottam Tiwari* (2001(3) SCC 179) held that, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. The same principle has been restated in the decision of the Apex Court reported in *Madhukar v. Sangram* (2001(4) SCC 756). It was held that, first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. Relying upon the above decisions it is submitted that the findings rendered by the appellate authority are far from satisfactory. We find that the appellate authority has considered the whole aspects in the right perspective and there is no fault on its duty while appreciating the contentions of the parties and assessing the evidence. Therefore, the said

argument is only to be rejected.

14. As rightly pointed out by the learned counsel for the respondent, the report of the commissioner and the evidence taken by him shall be evidence in the case and shall form part of the record going by Order 26 Rule 10(2). We also notice that the commissioner had given notice to the 2nd respondent Sunny who arrived there within 15 minutes of the arrival of the commissioner. His signature in token of acceptance is there in the notice annexed with Ext.C1. He has clearly stated in the report that the inspection was done after giving notice to him. Therefore, it cannot be contended that it was an ex parte commission. Going by the decision of a Division Bench of this Court in *Achuthan v. Kunhipathumma* (1967 KLT 326), notice to the parties is made compulsory only before the investigation is done by the Commissioner and under Order 26 Rule 9 it is open to the court to pass an ex parte order for the issue of a commission for investigation even before the defendant has entered appearance. It was also pointed out by the learned counsel for the respondent that the objections to the report of the commissioner filed by the petitioners show that they have not raised any serious dispute regarding the facts made available by the commissioner. In fact, the report Ext.C1 will show that one of the respondents was present at the time of inspection and he did not make any request to the commissioner to notice any particular fact in support of the plea that they are doing business

in the scheduled room. In fact, in para.12 of the judgment of the appellate court a reference is made to the argument of the learned counsel for the tenant relying upon Exts.B1, B3 and B5. Therefore, it is not a case where the appellate authority failed even to refer to Exts.B1, B3 and B5, as rightly pointed out by the learned counsel for the respondent.

15. As far as the ground available under Sec.11(4)(v) is concerned, it is well settled by various decisions of this Court that if the landlord has discharged the initial burden it is upto the tenant to lead evidence in the matter to show that he has been conducting business in the premises. A learned Single Judge of this Court in the decision report in *Abbas v. Sankaran Namboodiri* (1993(1) KLT 76) while examining the question held that, the word 'occupation' is used to denote the tenant's actual physical use of the building either by himself or through his agents or employees and legal possession is not sufficient. It was held that, "however, if a landlord succeeds in proving that his tenant did not occupy the building almost near the period fixed in Sec.11(4)(v) of the Act it may help the court to presume that there could have been cessation of occupation for the statutory period. Such background presumption is not anathematic to the law of evidence." In para.7 it was observed that, "be that as it may, burden is on the landlord to prove that the tenant ceased to occupy the building for six months. But it is hard to expect a landlord to prove the precise period during which his tenant

ceased to occupy the building. However, if the court is satisfied on the evidence and/or with the aid of presumptions that the tenant did not occupy the building for such length of time as would cover the statutory period, then the burden would shift to the tenant to show that he had reasonable cause for such non-occupation." Finally it was also observed in para.9 that, 'but, possession must combine with something more to make it occupation. Legal possession does not by itself constitute occupation.' These principles can be safely applied to the facts of this case.

16. The learned counsel for the respondent relied upon the decision of a Division Bench of this Court reported in *Kayikattil Rajagopalan v. Gopalan* (2004(2) ILR (Kerala) 102) to contend that if no business is carried on then the presumption is that there is cessation of occupation. The Division Bench examined the question in the light of the requirement of the provision namely, Sec.11(4)(v) and it was held as follows:

> **"Occupation in the context of section 11(4)(v) means only physical occupation. When it pertains to a residential building, it means occupation through residence and when it pertains to a commercial building, it means occupation by conduct of business. Certainly it is not obligatory that the tenant of a residential building should be present physically in the building all the 24 hours of the day and tenant of a commercial building should be present all the business hours of the day. But in cases pertaining to commercial building like the present one let out for business purpose, if it is seen that no business is being carried on in the premises and that the premises are remaining closed, there will be justification to presume that there has been cessation of occupation. In the instant case, the premises were**

> **let out originally for the conduct of grocery business. Admittedly grocery business is no longer being conducted by the tenant. Reasonableness or otherwise of the cause due to which the tenant ceased to occupy the premises is a matter especially within the tenant's knowledge. Once cessation is shown, it is for the tenant to prove that the same has been due to a reasonable cause if he needs to avert eviction. We will mention that reasonable cause can never be a cause within the control of the tenant himself."**

To the same effect is the decisions reported in *Mathai Antony v. Abraham* (2004(3) KLT 169) and in *Kurian Thomas v. Sreedharan Menon* (2004(3) KLT 326).

17. The decisions reported in *Mathai Antony v. Abraham (*2004(3) KLT 169) and *Kurian Thomas v. Sreedharan Menon* (2004(3) KLT 326) have laid down the meaning of the term 'occupy' and considered the question whether physical possession of the premises alone will satisfy the requirements of Sec.11(4)(v) of the Act. In the decision reported in *Mathai Antony v. Abraham* (2004(3) KLT 169), it was contended by the landlord that intermittent opening of the shop or the presence of the tenant in the premises would not show that the tenant is using the premises. In the light of the said contention, Their Lordships examined the scope of the provision. It was held that, 'the word 'occupy' has a distinct meaning so far as the Rent Act is concerned when pertains to tenant, that is, possession with user. We extract the findings rendered in para.4 which are in the following terms:

"The word "occupy" occurring in S.11(4)(v) has got different meaning in different context. The meaning of the word "occupy" in the context of S.11(4)(v) has to be understood in the light of the object and purpose of the Rent Control Act in mind. The rent control legislation is intended to give protection to the tenant, so that there will not be interference with the user of the tenanted premises during the currency of the tenancy. Landlord cannot disturb the possession and enjoyment of the tenanted premises. Legislature has guardedly used the expression "occupy" in S.11(4)(v) instead of "possession". Occupy in certain context indicates mere physical presence, but in other context actual enjoyment. Occupation includes possession as its primary element, and also includes "enjoyment". The word "occupy" sometimes indicates legal possession in the technical sense; at other times mere physical presence. We have to examine the question whether mere "physical possession" would satisfy the word "occupy" within the meaning of S.11(4)(v) of the Act. In our view mere physical possession of premises would not satisfy the meaning of "occupation" under S.11(4)(v). The word "possession" means holding of such possession, animus possidendi, means, the intention to exclude other persons. The word "occupy" has to be given a meaning so as to hold that the tenant is actually using th premises and not mere physical presence or possession. A learned single Judge of this Court in *Abbas v. Sankaran Namboodiri* (1993(1) KLT 76) took the view that the word occupation is used to denote the tenant's actual physical use of the building either by himself or through his agents or employees. The Division Bench of this Court of which one of us is a party (Radhakrishnan, J.), in Rajagopalan v. Gopalan (2004(1) KLT SN P.54) interpreting S.11(4)(v) took the view that occupation in the context of S.11(4) means only physical occupation, which requires further explanation. Occupation in the context of S.11(4)(v) means actual user. If the landlord could establish that in a given case even if the tenant is in physical possession of the premises, the premises is not being used, that is a good ground for eviction under S.11(4)(v) of the Act. S.11(4) uses the words "put the landlord in possession" and not "occupation", but 11(4)(v) uses the words "the tenant ceases to occupy". In S.11(4)(v)in the case of landlord the emphasis is on "possession" but in the case of tenant the emphasis is on "occupation". The word "occupy" has a distinct

> **meaning so far as the Rent Act is concerned when pertains to tenant, that is, possession with user."**

The Division Bench followed the decision of the Apex Court in *Ram Dass v. Davinder* (2004(3) SCC 684) in arriving at the said conclusion. In 2004(3) KLT 326 the question was again examined in the light of the contention that the landlord should establish that the tenant has abandoned the building so as to attract Sec.11(4)(v). Herein it was held that mere physical possession of the premises by the tenant is not sufficient and there should be use of the building. It was also held that the tenant need not abandon the building so as to attract Sec.11(4)(v) of the Act. Their Lordships held as follows:

> **"Rent Control Court and Appellate Authority used words which are not in the statute. Statute has not used the word "abandonment". The word "abandon" means to give up, to desert etc. Tenant need not abandon the building so as to attract S.11(4)(v) of the Act. Landlord is also not expected to establish that tenant has abandoned the building so as to attract S.11(4)(v). Once landlord could establish that tenant has ceased to occupy the premises continuously for six months prior to the filing of the petition he is entitled to get order of eviction under that section. The word "occupation" must be understood to be not mere physical possession. Tenant should use the building. The word "occupy" means to cohabit with, to hold or have in possession. Tenanted premises must be in the state of being enjoyed and occupied. The word "occupy" used by the statute would show that tenanted premises be put to use. Tenant cannot be heard to contend that he is having physical possession of the premises though not in occupation. So far as this case is concerned, we are of the view landlord has discharged the burden and then the onus has shifted to the tenant and the tenant could not establish that he has not ceased to occupy the premises and even if there is cessation that was with reasonable case."**

The situation herein is similar. Merely by opening the room and retaining the telephone the tenant cannot be heard to say that he is in occupation of the building and is in actual user of the same for conducting business as the physical possession alone is not sufficient at all.

18. In the light of the above principles, we find that merely because of the fact that there was a telephone in the room and that the room remained open when the commissioner visited, we cannot hold that the tenant was doing business therein for the statutory period. The burden had clearly been shifted to the tenant in the light of the situation of non-user that is available in relation to the room as reported by the commissioner. The tenant has failed to adduce any cogent evidence to substantiate his contention that he was conducting business in the schedule room. There is no evidence to show that they were conducting business as commission agent also. Exts.B1, B3 and B5 are not sufficient to sustain the contention. No worthwhile evidence, in the form of accounts, ledgers, etc., have been produced, and no details have been spoken to by RW1 also.

19. The learned counsel for the petitioners cautioned us by contending that in exercise of the revisional power under Sec.20, this Court cannot re-assess the evidence to justify the conclusions rendered by the appellate authority. It is submitted that the revisional jurisdiction does not extend to that. It is well settled that the powers of Sec.20 are wider than that

is conferred under Sec.115 of the CPC. The nature and scope of the powers of revision under Sec.20 has been considered by the Apex Court in the decision reported in *Nalakath Sainuddin v. Koorikadan Sulaiman* (2002(6) SCC 1). It was held that, "when the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Subject to limitations placed on the exercise of revisional jurisdiction, it remains a part of the general appellate jurisdiction of a superior court in a wider and larger sense." Their Lordships further held in para.12 that, "a jurisdiction to examine the propriety of the order or decision carries with it the same jurisdiction as the original authority to come to a different conclusion on the said set of facts. If any other view is taken, the expression "propriety" would lose its significance." It was further held in para.17 as follows:

> **"(i) There is no reason to read and interpret Section 20 of the Kerala Buildings (Lease and Rent Control) Act, 1965 narrowly and limit the scope of revisional jurisdiction conferred on the High Court thereby.**
>
> **(ii) Once a revision petition is entertained by the High Court, whichever be the party invoking the revisional jurisdiction, the High Court acquires jurisdiction to call for and examine the records of the authority subordinate to it. The records relating to "any order" and/or any proceedings, are available to be examined by the High Court for the purpose of satisfying itself as to the (a) legality, (b) regularity, or (c) propriety of the impugned order, including any part of the order, or proceedings. The only limitation on the scope of the High Court's jurisdiction is that the order or proceedings sought to be scrutinized must be of the subordinate authority.**

> **Any illegality, irregularity or impropriety coming to its notice is capable of being corrected by the High Court by passing such appropriate order or direction as the law requires and justice demands."**

Therefore, we find that the contention that the powers under Sec.20 is too narrow even to consider the pleadings and evidence to find whether the approach made by the appellate authority is erroneous does not appear to be correct. This Court can examine whether the findings rendered by the appellate authority are plausible and to consider that aspect, this Court can refer to the pleadings and evidence adduced by the parties. A pedantic approach cannot be made while examining the issue in the light of the requirement of the Act. So, the said argument is also rejected.

20. The learned counsel for the petitioners, relying upon the materials produced along with IA.No.1986/2006 contended that the title of the wife of the landlord is cloudy, in the sense that actually the said shop room does not belong to her. The said room was attached by a creditor M/s.Mar Appraem Kuri Co., Ltd., and she had purchased the property while the attachment was in force on 28/10/1987. It was also submitted that the attaching creditor brought the property to sale and the property was sold in public auction and purchased by the decree holder/auction purchaser. It is also averred that the sale sannad was issued and the delivery of the property was sought through court and the wife of the landlord has filed OS.No.502/1994 for setting aside the sale, which is pending. It is, therefore,

contended that the landlord herein had suppressed these facts and has obtained the order of eviction by playing fraud and therefore on this score itself the eviction petition has to be dismissed. In support of the above contention the learned counsel has relied upon the decisions of the Apex Court in *S.P. Chengalvaraya Naidu v. Jagannath* (AIR 1994 SC 853) and *Hamza Haji v. State of Kerala* (2006(3) KLT 941). In *S.P. Chengalvaraya Naidu v. Jagannath (*AIR 1994 SC 853) it was held that, withholding of a vital document tantamount to play fraud on the court. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party. In *Hamza Haji v. State of Kerala* (2006(3) KLT 941) also the Apex Court held that, it is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eye of law.

21. The learned counsel for the respondent referred to the counter affidavit filed by the respondent to the above IA and submitted that the pendency of the said suit had absolutely no bearing on the subject matter of the revision petition. It is submitted that shop room adjoining the petition schedule property is in the possession of the landlord herein. Therefore the learned counsel submits that nothing turns around on the allegation of fraud attributed by the petitioners. It is not disputed that the landlord is conducting business of his own in the property of which his wife is the owner.

The bonafide need put forth is for expanding the business. That means, the petition schedule room is also required for the purpose of business of the landlord. Therefore the requirement being one for conducting business in the petition schedule room also and as the landlord is still in possession of the adjoining room and has not lost it during the pendency of this revision petition also. No defect is there as regards the title of the landlord in respect of the schedule room. We, therefore, are of the view that the contentions raised by the learned counsel for the petitioners by relying upon the decisions of the Apex Court are not sustainable. In those cases even before coming to the court, the parties therein had lost title and possession over the respective properties as per documents executed by them which were suppressed from the court. Here that situation does not arise at all. Therefore, no reliance can be placed on those decisions.

22. The appellate authority also found that the tenant has not established any grounds to get the benefit of second proviso to Sec.11(3) in fact, in the deposition of RW1 he has not deposed that they are mainly depending upon the income from the petition schedule room for their livelihood. It is a well settled position that the burden is on the tenants to prove elements to claim the benefit of second proviso to Sec.11(3). RW1 has stated that the family has got a monthly income to the tune of Rs.25,000/- and from the business in the schedule room the income is Rs.3,000/- per month.

Therefore, it is clear that they are not depending mainly on the income from the business in the schedule building for their livelihood. We, therefore, find that the tenant has not established grounds to get the benefit of the second proviso.

23. We, therefore, dismiss the revision petition. The petitioners are granted six months time to vacate the premises on them filing an unconditional undertaking in the form of an affidavit before the execution court/rent control court within three weeks from today undertaking to vacate the premises within six months from today. Arrears of rent, if any, shall also be deposited within one month from today and the monthly rent from time to time shall also be paid to the landlord till the room is vacated.

K.BALAKRISHNAN NAIR, JUDGE.

T.R.RAMACHANDRAN NAIR, JUDGE.

Kvs/-